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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO.

RICHARD L. GRAY,

Petitioner

vs.

GULF, MOBILE & OHIO RAILROAD COMPANY, a corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays the Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fifth Circuit, to the end that this Court may review a decision which that Court has rendered in a case involving the parties above-named. And the Petitioner respectfully shows to this Court:

THE OPINIONS AND JUDGMENTS OF THE COURTS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit has not yet been printed in the official reports, but is set forth, along with the Judgment of that Court, in the Appendix to this Petition.

The case came to the Court of Appeals on appeal from a Summary Judgment of the United States District Court for the Southern District of Alabama. The Opinion and Judgment of the District Court is reported at 302 F. Supp. 292 (1969), and is also set forth in the Appendix to this Petition.

JURISDICTION OF THIS COURT

The Judgment of the Court of Appeals is dated July 13, 1970, and was entered on that date.

Jurisdiction to review, by Writ of Certiorari, the Judgment of the Court of Appeals is conferred on this Court by the provisions of 28 USC §1254.

QUESTIONS PRESENTED FOR REVIEW

Is the Federal Railway Labor Act to be construed as authorizing a requirement upon the plaintiff that, in order to hold his job with the defendant Railroad Company, he must contribute financial support to the defendant labor Union, even though it is established that his doing so would directly conflict with his religious faith?

If the statute be so construed and applied against the plaintiff, does that not violate rights guaranteed to him by the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Provisions of the Constitution of the United States and of the Federal Railway Labor Act pertinent to this case are as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof".

First Amendment to the Constitution of the United States

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

Fifth Amendment to the Constitution of the United States

"Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the

failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership".

45 USC §152, Eleventh

STATEMENT OF THE CASE

The plaintiff's Complaint established federal jurisdiction in this case on the basis of 28 USC §1331(a) and 1343 and 42 USC §1988.

As both the District Court and the Court of Appeals have stated, the essential facts of the case "are not disputed" (2a, 22a[1]). The defendants have a contract between them, by which employees of the defendant Railroad Company are required to pay dues and fees to the defendant Union in order to hold their jobs with the Railroad Company (2a-4a, 22a-23a). There is a federal statute which in general authorizes such contracts. 45 USC §152, Eleventh.

The plaintiff, a railway machinist, declined to pay such dues and fees, upon the ground that his being compelled to support or pay money to any labor Union directly conflicted with his religious faith and convictions (4a, 23a). He was, however, willing, and offered to contribute, on a regular basis, to public charity an amount of money equivalent to the Union dues and fees—a procedure which had at one time

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[1]Unless otherwise indicated, page references are to the Appendix to this Petition.

been suggested to the constituent Unions of the AFL-CIO by the "AFL-CIO Executive Council on Union Membership and Religious Objectors" (7a, 25a).

The District Court found that there was no dispute as to "the sincerity of plaintiff's religious faith" in this matter, and that there was "before the Court" a "sincere individual who finds such organization in conflict with his religious conscience" (24a, 30a). The Court of Appeals refers to the plaintiff as one "whose religious convictions compel him to reject all forms of Union affiliation", and the Court of Appeals twice declared that "we do not doubt that plaintiff Gray has a genuine and sincere religious conviction that his financial support of a labor Union would be wrong" (1a, 7a, 19a).

The plaintiff went through all steps of petition and appeal prescribed by the defendants, urging upon them that he not be "forced to abandon" his "religious conviction in order to hold [his] job" (Joint Appendix in Court of Appeals, p. 13). His plea was "I want to earn my living and still adhere to my religion" (Joint Appendix in Court of Appeals, p 13). Nevertheless, the Railroad Company, at the demand of the Union, discharged the plaintiff solely because of his unwillingness to pay dues and fees to the Union (8a, 26a).

The plaintiff upon being discharged, instituted suit in the United States District Court for the Southern District of Alabama, at Mobile, where the defendant

Railroad Company has its principal office. Upon the pleadings in the case, and affidavits and documentary material filed therewith, the Court deemed that the case was "properly before the Court for Summary Judgment" (22a). The District Court thereupon entered Summary Judgment for the defendants, denied the plaintiff any relief and dismissed the action (31a). These rulings were, upon appeal, "affirmed" by the Fifth Circuit Court of Appeals (19a).

ARGUMENT AMPLIFYING REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

In the diadem of the rights guaranteed to the individual by the Constitution of the United States, there is assuredly none higher or greater than that of religious liberty. Yet the ruling of the Courts below is that this bright and guiding star becomes eclipsed and fades entirely from judicial vision when confronted with a demand for dues and fees under a Union shop contract.

Here the defendants called upon the plaintiff, in the name of an authority they claimed to have been conferred on them by federal statute and said to him: "Give up either your religious faith or your employment. You are now going to be forced to abandon the one or the other". And upon his clinging to his religion, they took from him his employment. Whereupon, he is informed by the rulings of the Courts below that nowhere in the Constitution or laws of this Nation is there any protection or relief for him.

I.

The Plaintiff's Religious Faith Is In Genuine And Direct Conflict With The Requirement Placed Upon Him By The Defendants

It would seem, at this point, pertinent to establish clearly that the plaintiff is completely sincere in claiming that the compulsion in question is irreconcilable with his religious faith. On this the record is unequivocal.

The plaintiff alleged under oath that "to pay any dues or fees to the Union . . . would violate his religious convictions", and that assertion has not been denied by the defendants (Joint Appendix in Court of Appeals, p. 3). The arbitrator, before whom the plaintiff was given a hearing under the provisions of the defendants' contract, found that the plaintiff was in truth and in fact refusing to pay dues and fees to the Union "because of his religious convictions" (Joint Appendix in Court of Appeals, p. 70).

At his hearing before the arbitrator, the plaintiff made the following statement:

> "I am not willing to pay any dues or fees to the Union, because it is against my religious convictions to do so. I have previously made this clear to the Company and to the Union.
>
> "I am a member of the Seventh-Day Adventist Church. I am a devoted believer in the tenets and teachings of this Church, and I try to follow them conscientiously.

"My Church teaches that 'the remedy for social evils is not to be found in argument, controversy or strife' and that 'the remedy must be secured individually' — not through organization but by 'change of heart' and 'attitude' in each person (5a, Joint Appendix in Court of Appeals, pp. 10-11).

"The leaders of my Church have emphasized this many times:

'. . . A Seventh-Day Adventist should not join a group that will take the power of decision from him. There might be times when the action of the group as a whole would be contrary to the Christian principles he embraces'.

'A Seventh-Day Adventist cannot join in conflict with any class, either capital or labor, and retain his power to draw men by the influence of the Holy Spirit. A Seventh-Day Adventist would antagonize the working man if he should join forces against labor and he would be unable to witness successfully for Christ before the employer if he aligns himself with those opposing management'.

'In this work we are to preserve our individuality. We are not to unite with secret societies or with trade unions. We are to stand free in God, looking constantly to Christ for instruction' (5a, Joint Appendix in Court of Appeals, pp. 11-12).

"The 'historic' and 'official' position of our Church is stated as follows:

> 'The Seventh-Day Adventist Church is against involvement with labor organizations'.

"Clearly I would violate these principles and these teachings of my Church if I contribute financial assistance and support to the International Association of Machinists, AFL-CIO. And in so doing I would violate my own conscience and religious conviction" (Joint Appendix in Court of Appeals, p. 13).

At an earlier hearing before officials of the Union, the plaintiff's pastor, Reverend Roland A. Lehnhoff, testified that the plaintiff:

> "... [I]s a member of the Seventh-Day Adventist Church whose position is that we do oppose joining labor Unions and paying Union dues" (Joint Appendix in Court of Appeals, p. 56).

The District Court correctly observed that "the members" of the Seventh-Day Adventist Church "as individuals, are the sole judge for their action" in this realm. But that Court was inadvertent to the admitted facts in stating that this Church "does not advocate that its members refrain from joining or supporting labor Unions" (30a). The Church does not purport to place any requirement upon its members in the matter, but, as seen above, does teach them to refrain

from aligning themselves with, or in any manner supporting, labor organizations.

The Court of Appeals summarized the matter as follows. "From these statements in the record we gather that there is no catechistical pronouncement directing all Seventh-Day Adventists to abstain from joining or supporting labor unions. At the same time, we have no reason to doubt that plaintiff Gray's understanding of the tenets of his Church had led him to embrace the sincere religious conviction that it would be wrong for him to join or support a labor union" (7a).

And, as hereinabove pointed out, the conclusion of the District Court was that there is no dispute as to "the sincerity of plaintiff's religious faith" in this matter, and that there was "before the Court" a "sincere individual who finds such organization in conflict with his religious conscience" (24a, 30a).

Similiarly, as has been also noted, the Court of Appeals concluded that the plaintiff was a man "whose religious convictions compel him to reject all forms of union affiliation" and that "we do not doubt that plaintiff Gray has a genuine and sincere religious conviction that his financial support of a labor union would be wrong" (1a, 19a).

Thus it stands as established and uncontradicted that the plaintiff's religious faith is in direct conflict with the requirement of the defendants that he pay dues and fees to the Union.

II.

Since The Requirement Placed Upon The Plaintiff By The Defendants Directly Conflicts With His Religious Faith, Such Requirement Is Either Unauthorized By The Statute—Or If It Be Held Authorized By The Statute, It Nevertheless Cannot Prevail Against His Constitutional Rights

It is important to bear in mind that this is not a situation in which compulsion is imposed upon the plaintiff by purely private action and in which the hand of Government is not present—and in which, therefore, constitutional limitations have no relevance. This Court has ruled specifically to the contrary.

In *Railway Employes' Department, AFL vs. Hanson*, this Court, having before it the same statute and the same contract, which are now in question—albeit, the Railroad Company and the Union were not those which are here involved—declared that the hand of the Federal Government is the effective force upon the employee in this situation, that this contract has "the imprimatur of the federal law upon it", and that "the federal statute is the source of the power" by which the right of the individual employee is "lost or sacrificed". "The enactment of the federal statute authorizing union shop agreements", said the Court, "is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction". *Railway Employe's De-*

partment, AFL vs. Hanson, 351 US 225, 232, 76 S Ct 714, 100 L Ed 1112, 1130[1].

In *Hanson*, this Court upheld the general validity of this statute, but it was specifically stated that the Court "put to one side" and reserved for future decision "situations not now before us" under which the protections of the First Amendment might be invoked. *Railway Employes' Department, AFL vs. Hanson*, 351 US 225, 242, 76 S Ct 714, 100 L Ed 1112, 1136.

Likewise, in *International Association of Machinists vs. Street*, the Court again emphasized that, in *Hanson*, it had upheld Section 2, Eleventh of the Railway Labor Act, only against a generalized claim that it was broadly and on its face unconstitutional. The Court said:

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[1]The defendants, and likewise the District Court, have placed emphasis on the *Otten* and *Wicks* cases. *Otten vs. Baltimore & Ohio Railroad Co.*, 205 F. 2d 58 (2nd Cir., 1953); *Otten vs. Staten Island Rapid Transit Co.*, 222 F. 2d 919 (2nd Cir., 1955); *Wicks vs. Southern Pacific Co.*, 231 F. 2d 130 (9th Cir., 1956). Those decisions proceeded, however, upon the view, specifically rejected by this Court in *Hanson*, that this Union shop agreement, which is prevalent throughout the railway industry of the Nation, is simply a private affair in which no governmental action is present, and in which, consequently, there can be no constitutional problem or issue.

It should, moreover, be noted that in Alabama, where this case was litigated, there is a State "right-to-work" law, which would have protected the plaintiff from the compulsion here in question, were it not for the fact that the federal statute affirmatively and expressly strikes down such protections everywhere. 26 Ala. Code §375.

"It is argued that our disposition of the First Amendment claims in *Hanson* disposes of appellees' constitutional claims in this case adversely to their contentions. We disagree.

• • •

"... [T]his Court passed merely on the constitutional validity of §2, Eleventh of the Railway Labor Act on its face, and not as applied to infringe the particularized constitutional rights of any individual.

• • •

"We therefore reserved decision of the constitutional questions which the appellees present in this case".

International Association of Machinists vs. Street, 367 US 740, 746, 748, 81 S Ct 1784, 6 L Ed 2d 1141, 1148, 1149

This Court in *Street* then analyzed the statute and its legislative history and declared that it did not construe the statute as authorizing compulsion upon an employee to pay money to a labor Union, as a condition of holding his job, if, and to the extent that, the Union used such money for political and ideological purposes which the employee opposed. *International Association of Machinists vs. Street*, supra. See also *Brotherhood of Railway Clerks vs. Allen*, 373 US 113, 83 S Ct 1158, 10 L Ed 2nd 235.

No such qualification appears, of course, upon the face of the statute. Yet this Court, in the interest of First Amendment rights of freedom of speech and

freedom of association, construed this statute as having no meaning or intendment to authorize the exaction of Union dues and fees when such exaction would conflict with these First Amendment rights.

Similarly, in the realm of religious liberty, this Court has recently construed the Universal Military Training and Service Act as affording military exemption to one who opposed war not in the sense of a traditional religious faith but as a matter of "deeply held" moral and ethical conviction. *Welsh vs. United States*, __ US __, 90 S Ct __, 26 L Ed 2d 308.

In this case, as will be remembered from the quotations hereinabove set forth, there is no doubt but that the plaintiff's religious convictions represent religion in every full and traditional sense. In the example, then, of *Street* and *Welsh*, is it not appropriate to construe the present statute as not meaning to authorize the exaction of Union dues and fees from individuals like the plaintiff, as to whom such exaction would clearly and undeniably be in conflict with his religious faith?

If, however, the Court is unwilling thus to construe the statute, we come to the ultimate constitutional question. Can the Federal Government, in the face of the First "Thou Shall Not" set up against it in the Constitution, impose upon a citizen a compulsion that he abandon either his religion or his employment?

This is not in any wise a misstatement nor an overstatement of the issue. As has been seen, it is settled that the Federal Government is here the power behind

the action and the compulsion. And it is plain beyond argument that the plaintiff is being implacably told: "You can continue to work in this job, only if you relinquish and cease to practice your religious faith. Pay the Union dues, though it violates your religion, else leave this job—one or the other. You cannot earn your living in this employment and at the same time hold to your religion".

Can there be any possible doubt that this is an interference with the employee's "free exercise" of his religion? What could be a more fundamental interference with an individual's religion than to require that it be exercised only upon the penalty of his giving up his livelihood?

It may be said that the plaintiff can go elsewhere and perhaps find a job in which he can both work and practice his religion. But so could the employees in *Street* have done. If an employee loses his job because he stands against a compulsion that violates his constitutional rights, the contest is certainly not lawfully or rightly resolved by telling him that he can go hence and seek other employment.

Moreover, as a matter of hard fact and actuality, the work in which this plaintiff is trained and skilled, that of railway machinist, is closed to him everywhere. For, as is common knowledge, the same compulsion under the same Union shop agreement exists throughout the railway industry of our country.

Essentially, the reasoning process, by which the Courts below rule against the plaintiff in this situa-

tion, is that of deferring to the "policy makers", that is, Congress in their determining of what is appropriate to the carrying out of their delegated power to regulate interstate commerce (27a). This reasoning is expressed in *Hanson* as follows:

> "The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises. The ingredients of industrial peace and stabilized labor-management relations are numerous and complex . . . The decision rests with the policy makers, not with the judiciary".
>
> *Railway Employes' Department, AFL vs. Hanson*, 351 US 225, 234, 76 S Ct 714, 100 L Ed 1112, 1132

But it is one thing to defer to the choice of the policy maker when the central question is whether the policy maker's choice is rationally related to the carrying out of delegated power. Deferring to such choice when a monolithic "Thou Shall Not" stands in the way, is an entirely different matter. The latitude to be allowed to the policy weighing process is surely not the same in these two situations.

Here, it is submitted, lies the fundamental error of the Courts below. *Hanson*, which both the lower Courts basically relied on, was, for example, not a case in which the plaintiffs were invoking the shield of the First Amendment to protect "the free exercise" of their religion or their "freedom of speech", and the like. The Court said "that problem is not presented

by this record". *Railway Employes' Department, AFL vs. Hanson*, 351 US 225, 242, 76 S Ct 714, 100 L Ed 1112, 1136 (concurring opinion of Mr. Justice Frankfurter). *International Association of Machinists vs. Street*, 367 US 740, 746, 748, 81 S Ct 1784, 6 L Ed 2d 1141, 1148, 1149.

Thus the clash of a plea of religious liberty under the First Amendment, against the compulsion created by the statute in question, has not heretofore come before this Court. Here and now this conflict is presented—directly and specifically.

And the basic point the plaintiff is now making is that the concept of deferring to the policy maker is not to be acquiescently followed here — as if the mighty interdiction of the First Amendment were not applicable to the case. For it is applicable, and it is here brought to bear directly, specifically and in all its transcending power.

> "I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment and imbedded in the Fourteenth".
>
> *Sherbert vs. Verner*, 374 US 398, 413, 83 S Ct 1790, 10 L Ed 2d 965, 976
> Mr. Justice Stewart (concurring)

"[T]he values of the First Amendment, as embodied in the Fourteenth, look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals.

. . .

"The Court in such cases is not confined to the narrow inquiry whether the challenged law is rationally related to some legitimate legislative end. Nor is the case decided by a finding that the State's interest is substantial and important, as well as rationally justifiable.

. . .

"The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis, for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.

. . .

"This exacting standard has been consistently applied by this Court as the test of legislation under all clauses of the First Amendment, not only those specifically dealing with freedom of speech and of the press. For religious freedom—the freedom to believe and to practice strange and, it may be, foreign creeds—has classically been one of the highest values of our society.

. . .

"The honored place of religious freedom in our constitutional hierarchy . . . must now be taken to be settled".

Braunfeld vs. Brown, 366 US 599, 610, 611, 612, 613, 81 S Ct 1144, 6 L Ed 2d 563, 570, 571, 572
Mr. Justice Brennan (concurring and dissenting)

"The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority".

Abington School District vs. Schempp, 374 US 203, 222-223, 83 S Ct 1560, 10 L Ed 2d 844, 858

"We must next consider whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice".

Sherbert vs. Verner, 374 US 398, 406, 83 S Ct 1790, 10 L Ed 2d 965, 972

The issue in *Sherbert vs. Verner* was closely analogous to that of the present case. In that case an employee was discharged from her employment because she refused to work on Saturdays. It was undisputed

that such refusal was based solely on the employee's conviction that working on Saturday conflicted with her religion. Her discharge was a matter of private action, in which the hand of Government was not present. But thereafter, by governmental authority, she was denied unemployment benefits. This Court held that such governmental action was constitutionally invalid, in that it brought to bear upon the employee a harmful consequence because of her adherence to her religion.

"We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does.

. . .

"Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forgo that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.

. . .

". . . [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively pena-

lizes the free exercise of her constitutional liberties".

Sherbert vs. Verner, 374 US 398, 403, 404, 406, 83 S Ct 1790, 10 L Ed 2d 965, 970, 971

Russell vs. Catherwood was similarly a case relating to unemployment benefits. There Chief Justice Burger, with whom Mr. Justice Douglas joined, in dissenting from a denial of Writ of Certiorari, said:

"The Industrial Commissioner, if we are to place any weight on his response here, has shown that he considers the petitioner bound to accept a job tender even when his acceptance requires union membership that is repugnant to him. It may be that on plenary consideration we would conclude that the Constitution requires the respondent to provide employment that does not conflict with the worker's freedom of association, as might be indicated under *Sherbert v. Verner*, 374 U.S. 398 (1963).

• • •

"I would grant the writ because I believe that the petitioner has presented a substantial question and possibly one of important constitutional dimensions that warrants plenary—not summary— consideration".

Russell vs. Catherwood, No. 1978, Misc., Decided June 29, 1970 (On Petition For Writ of Certiorari to the Appellate Division, Supreme Court of New York)

It is well to consider the steps of inference, piled one upon the other, by which the lower Courts deem that the basic and massive barrier of the First Amendment is here surmounted. Congress, of course, has the power "to regulate commerce . . . among the several States"[1]—and therefore it can regulate labor relations in the railway industry—and therefore it can compel collective bargaining between employers and Unions in the industry—and therefore it can authorize a compulsion that all employees shall pay dues and fees to the Unions in order to work in the industry.

Is the last step in this legal structure to be considered of such high value and towering importance that it is to be allowed to vault over the First Amendment? The Courts below say that the answer is—yes[2].

> "The Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual".
>
> *Truax vs. Corrigan*, 257 US 312, 338, 42 S Ct 124, 66 L Ed 254, 265

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of politi-

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[1]Constitution of the United States, Article I, Section 8(3).

[2]It is significant to note that in the Labor Management Relations Act, Congress itself did not consider this last step of compulsion so important to the regulation of commerce, but that it was willing, in Section 14(b) of that Act, for this compulsion to be subordinated to any State laws disapproving it. 29 USC §164(b).

cal controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections".

West Virginia State Board of Education vs. Barnette, 319 US 624, 638, 641, 63 S Ct 1178, 87 L Ed 1628, 1638, 1639

In a dissenting opinion which later became the majority view of this Court in *Barnette*, Mr. Justice Stone discerningly observed:

"History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities. The framers were not unaware that under the system which they created most governmental curtailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection".

Minersville School District vs. Gobitis, 310 US 586, 604-605, 60 S Ct 1010, 84 L Ed 1375, 1384 Mr. Justice Stone (dissenting)

To Thomas Jefferson it was clear that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical". Quoted in *McGowan vs. Maryland*, 366 US 420, 465, 81 S Ct 1101, 6 L Ed 2d 393, 421[1].

In recent cases, this Court has held that various interests—surely no more fundamental than that of religious liberty—are constitutionally protected to the individual against governmental action, federal or state. These include, for example:

> A constitutional right, when accused of crime, to be fully advised, counseled and protected from pressure at all stages.
>
> *Escobedo vs. Illinois*, 378 US 478, 84 S Ct 1758, 12 L Ed 2d 977;
> *Miranda vs. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694

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[1]Recently, in a case very similar to that which is now presented the United States District Court for the District of Massachusetts upholds the compulsion here in question against a First Amendment plea of religious liberty and advances the rather amazing proposition that "this action is not a violation of the First Amendment because it is the equivalent of a non-discriminatory tax levied pursuant to a power conferred by the Constitution". *Linscott vs. Miller Falls Company, et al*, __ F. Supp. __ (Civil Action No. 70-467-W, decision rendered September 16, 1970).

It is ironic to note that this same District Court lately held, on the other hand, that the same plea of religious liberty under the First Amendment, by a conscientious objector whom the Court deemed not within the exemptions of the Military Training and Service Act, prevails nevertheless against the Nation's present draft call. *United States vs. Sisson*, 297 F. Supp. 902 (1969).

A constitutional right against being penalized for working in a United States Defense facility while holding membership in the communist party, with knowledge that the party had not complied with a final order to register as a communist-action organization.

United States vs. Robel, 389 US 258, 88 S Ct 419, 19 L Ed 2d 508

A constitutional right against being suspended from a public school for wearing black arm-bands of protest or "freedom buttons".

Tinker vs. Des Moines Community School District, 393 US 503, 89 S Ct 733, 21 L Ed 2d 731

It is now even held that "guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees", and that as to such areas, though not named in the Constitution, the individual is nevertheless by that great Charter protected against compulsions brought to bear upon him under the authority of government, state or federal. *Griswold vs. Connecticut*, 381 US 479, 484, 85 S Ct 1678, 14 L Ed 2d 510, 514.

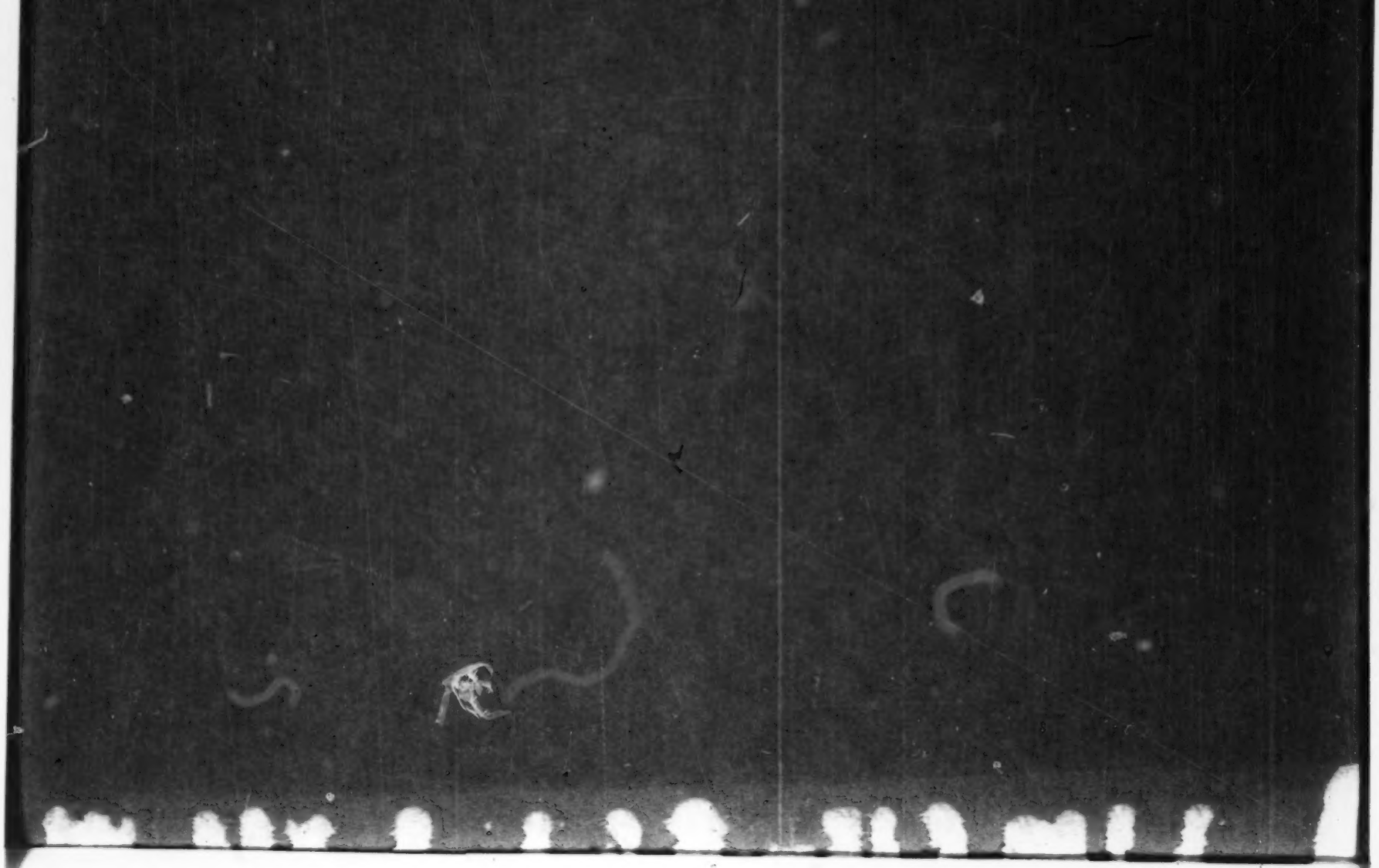
If rights such as there are protected by the Constitution, then surely the shield of religious liberty—positive, explicit, fundamental and primary among constitutional guarantees—will not now be denied by this Court to a citizen who, through the action of his government, has been deprived of his livelihood because he adhered to his religion.

CONCLUSION

Upon all of the foregoing, the Petitioner earnestly prays the Court for a Writ of Certiorari, directed to the United States Court of Appeals for the Fifth Circuit, to the end that this Court may review the decision which has been rendered by that Court in the present case.

Respectfully submitted,

WHITEFORD S. BLAKENEY
Attorney for the Petitioner



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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28202

RICHARD L. GRAY,

Plaintiff-Appellant,

versus

GULF, MOBILE & OHIO RAILROAD COMPANY, a corporation, ET AL,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

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(July 13, 1970)

Before TUTTLE, WISDOM and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge: We are called upon to resolve a clash between enforced union adherence and an individual conscience which forswears union allegiance. Plaintiff Richard L. Gray, whose religious convictions compel him to reject all forms of union affiliation, seeks to invoke the First Amendment as a pro-

tective shield against compulsory unionism sanctioned by the Railway Labor Act. The constitutional issue is sensitive and perhaps far-reaching, but our resolution of the issue is guided by previous Supreme Court teachings. Because we conclude that the court below was correct in its application of these teachings, we uphold the court's denial of relief.

The relevant facts are not disputed.[1] In February, 1967, plaintiff Gray began working as a machinist with the defendant railroad.[2] Previously the defendant railroad and the defendant union had entered into a union shop agreement pursuant to the provisions of § 2, Eleventh of the Railway Labor Act.[3] Section 2,

[1]The facts are set out in greater detail in the opinion of the district court, which is published at 302 F.Supp. 292.

[2]In the interest of complete accuracy we note that Gray had previously worked as a machinist for the defendant railroad. *See* 302 F.Supp. at 293-94. We consider his prior employment history irrelevant, however, because the record indicates that in February, 1967, Gray was treated as a new employee.

[3]Section 2, Eleventh, 45 U.S.C.A. § 152, Eleventh, provides:
"Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall re-

quire such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he

Eleventh permits union shop agreements provided there is no discrimination against any employee with regard to membership requirements, and provided further that membership is not denied or terminated for any reason other than failure "to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." Under the terms of the agreement here involved Gray was required to become a member of the union within the first sixty days of his employment. Gray refused to do so on the ground that his religious convictions forbade his joining or supporting a labor union.[4] In

holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended."

[4]Gray is a Seventh Day Adventist who interprets the teachings of his church as forbidding membership in or financial support of labor unions. At one point in the dismissal proceedings instituted against him because of his refusal to com-

ply with the union shop agreement, Gray submitted a statement explaining his religious beliefs to the arbitrator hearing his case. That statement included the following:

"I am not willing to pay any dues or fees to the Union, because it is against my religious convictions to do so. I have previously made this clear to the Company and to the Union.

"I am a member of the Seventh-Day Adventist Church. I am a devoted believer in the tenets and teachings of this Church, and I try to follow them conscientiously.

"My Church teaches that 'the remedy for social evils is not to be found in argument, controversy or strife' and that 'the remedy must be secured individually'—not through organization but by 'change of heart' and 'attitude' in each person."

In the same statement Gray quoted the following passages from "Seventh-Day Adventists and Labor Unions, by M. E. Loewen":

"The Scriptures teach that man is a free moral agent. Each individual must choose for himself whether he will serve God and how he will discharge his responsibilities to his God. (Deut. 30:15-20; Josh. 24:15). A Seventh-day Adventist should not join a group that will take the power of decision from him. There might be times when the action of the group as a whole would be contrary to the Christian principles he embraces.

* * *

"A Seventh-day Adventist cannot join in a conflict with any class, either capital or labor, and retain his power to draw men by the influence of the Holy Spirit. A Seventh-day Adventist would antagonize the working man if he should join forces against labor and he would be unable to witness for Christ before the employer if he aligns himself with those opposing management."

Also included in the record now before us is a letter signed by W. Melvin Adams, Associate Director, Department of Religious Liberty, General Conference of Seventh-Day Adventists. This letter, dated May 16, 1967, indicates that the

Seventh-Day Adventist position on labor unions is that every worker should decide for himself whether or not to join a union, but that every worker who decides not to join should be subject to no sanctions because of his decision. We quote from the letter:

"The following sets forth the position of the Seventh-day Adventist Church in the United States of America with reference to that body's relationship to labor unions, and the conviction of Seventh-day Adventist artisans and laboring men regarding membership in such organizations.

"Seventh-day Adventists are in sympathy with the basic objectives of organized labor—proper wages, proper hours, and proper working conditions. They believe that those laborers who are conscientiously free to do so are warranted in organizing to obtain such objectives.

"Seventh-day Adventists cherish as God's gift the principle of liberty of conscience as set forth in the Holy Scriptures, and recognized and acknowledged as inalienable by the government of the United States, both in the Declaration of Independence and in its Constitution. They not only treasure these liberties themselves, but concede them to all others.

"It is on the basis of these principles that they accord to every man the right to join, or not to join, a labor union. They believe, however, that no opposition should be raised against, and no penalties or disabilities applied to, those who choose not to belong to labor unions for reasons of conscience. This is fundamental in the application of the principles of civil and religious freedom referred to above.

"Those Seventh-day Adventists who do not join labor unions are led to take this course because of religious convictions. They feel themselves barred by conscience from membership in any industrial management organization or labor union which involves men of varying convictions being associated together in one organization and mutually required to adhere to policies, comply with decisions and abide by restrictions which may be contrary to individual conscience. No person can enjoy or exercise freedom of

lieu of union membership the union offered Gray an arrangement whereby he could pay the required dues and fees without actually becoming a member of the union, but Gray found even this proposed arrangement unacceptable.[5] In his own words, "I had become of the genuine and sincere conviction that to pay dues and fees to the union would violate my religious faith."[6] Because Gray's unwavering refusal to comply with the terms of the union shop agreement, dismissal

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conscience or religion when bound to a course he believes to be against conscience, or to be unscriptural.

"While Seventh-day Adventists sympathize with the worthy objectives of labor unions, it is well known that occasions arise when, failing to obtain these objectives through the peaceful processes of negotiation, mediation and arbitrations, measures of coercion are restored to, taking the form of boycotts, strikes, picketings, and similar methods of enforcing their demands. Being under the scriptural injunction, as Christians, that 'the servant of the Lord must not strive,' and that he is to 'do violence to no man,' Seventh-day Adventists believe sincerely they must stand apart from a relationship which requires participation in such procedures."

From these statements in the record we gather that there is no catechistical pronouncement directing all Seventh-Day Adventists to abstain from joining or supporting labor unions. At the same time, we have no reason to doubt that plaintiff Gray's understanding of the tenets of his church had led him to embrace the sincere religious conviction that it would be wrong for him to join or support a labor union.

[5]Gray did express his willingness to pay to a designated charity amounts equal to the required union fees and dues, but the union refused to accept such an arrangement.

[6]This statement is taken from an affidavit filed in the district court.

proceedings were instituted against him,[7] and at the conclusion of the proceedings the railroad had no alternative but to terminate his employment.

Having lost his job because of his religious convictions, Gray brought suit against the railroad and the union in the United States District Court for the Southern District of Alabama. In his complaint he contended that the termination of his employment was in violation of the First, Fifth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution.[8] In his prayer for relief he sought (1) an order granting him reinstatement to his former position, (2) an injunction forbidding his discharge in the future for failure to pay union dues and fees so long as his refusal to do so was based on his religious convictions, and (3) an award of damages growing out of his loss of employment. The district court denied relief, and plaintiff has appealed. Finding ourselves in agreement with the opinion written by Judge Thomas in the court below, we affirm.

On appeal Gray hurls a two-fold argument at the statute. He contends initially that §2, Eleventh should not be interpreted to require a railroad employee to

[7]As the district court noted, the dismissal proceedings took place within the context of the "prescribed and detailed" procedures in the union shop agreement. 302 F.Supp. at 294. The record indicates that Gray received full and adequate consideration at every stage of the proceedings.

[8]The scope of plaintiff's constitutional argument has been narrowed on appeal; he now bases his argument primarily on the free exercise clause of the First Amendment.

pay union dues and fees pursuant to a union shop agreement if the employee objects to such payments on religious grounds. Alternatively, if the statute is so interpreted, he contends that it is unconstitutional.

We find the first branch of Gray's argument — the statutory construction contention — totally devoid of merit. Nothing in the statute exhibits a congressional intent that any employee in a union shop situation is to be totally exonerated from the requirement of paying union dues and fees. On the contrary, § 2, Eleventh specifically permits agreements requiring "all employees" to become members of the union representing their craft or class. Thus we conclude that plaintiff's only possible salvation is to be found in his constitutional argument.

In deciding the constitutional issue we are not required to navigate in unchartered waters. Instead we are guided firmly to our destination by two Supreme Court decisions, *Railway Employees' Department, AFL v. Hanson*, 1956, 351 U.S. 225, 76 S. Ct. 714, 100 L.Ed. 1112, and *International Association of Machinists v. Street*, 1961, 367 U.S. 740, 81 S.Ct. 1784, 6L.Ed. 2d 1141. These decisions were relied upon by Judge Thomas in the court below; they have been invoked by the parties on this appeal; and we agree that they are dispositive of the issue now before us.

The decisions in *Hanson* and *Street* can best be understood in light of the legislative history of § 2, Eleventh. That legislative history was discussed at

great length in the *Street* opinion. As the Court there noted, "the question of union security in the rail industry was first given detailed consideration by Congress in 1934."[9] At that time, for a variety of reasons,[10] Congress chose to adopt § 2, Fifth of the Railway Labor Act, specifically forbidding union shop agreements.[11]

> "The question of union security was reopened in 1950. Congress then evaluated the proposal for authorizing the union shop primarily in terms of its relationship to the financing of the unions' participation in the machinery created by the Railway Labor Act to achieve its goals. The framework for fostering voluntary adjustments between the carriers and their employees in the interest of the efficient discharge by the carriers of their important functions with minimum disruption from

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[9]367 U.S. at 751, 6 L.Ed. 2d at 1151.

[10]*See* 367 U.S. at 751-53, 6 L.Ed.2d at 1151-52; *cf. Hanson*, 351 U.S. at 231, 100 L.Ed. 1130.

[11]Section 2, Fifth, 45 U.S.C.A. § 152, Fifth, provides:

> "Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way."

This section's prohibition of union shop agreements was rendered ineffective in 1951 by the passage of § 2, Eleventh. *See* note 3 *supra*.

labor strife has no statutory parallel in our industry. That machinery, the product of a long legislative evolution, is more complex than that of any other industry.[12]

* * *

"[I]n prescribing collective bargaining as the method of settling railway disputes, in conferring upon the unions the status of exclusive representatives in the negotiation and administration of collective agreements, and in giving them representation on the statutory board to adjudicate grievances, Congress had given the unions a clearly defined and delineated role to play in effectuating the basic congressional policy of stabilizing labor relations in the industry. . . .

"Performance of these functions entails the expenditure of considerable funds. Moreover, this Court has held that under the statutory scheme, a union's status as exclusive bargaining representative carries with it the duty fairly and equitably to represent all employees of the craft or class, union and nonunion. [Citing cases.] The principal argument made by the unions in 1950 was based on their role in this regulatory framework. They maintained that because of the expense of performing their duties in the congressional scheme, fairness justified the spreading of the costs to all employees who benefited. They thus advanced as their purpose the elimination of the 'free riders' — those employees

[12]367 U.S. at 755, 6 L.Ed.2d at 1153 (footnote omitted).

who obtained the benefits of the unions' participation in the machinery of the Act without financially supporting the unions.[13]

* * *

"This argument was decisive with Congress. The House Committee Report traced the history of previous legislation in the industry and pointed out the duty of the union acting as exclusive bargaining representative to represent equally all members of the class. 'Under the act, the collective-bargaining representative is required to represent the entire membership of the craft or class, including nonunion members, fairly, equitably, and in good faith. Benefits resulting from collective bargaining may not be withheld from employees because they are not members of the union.' HR Rep No. 2811, 81st Cong, 2d Sess, p. 4. Observing that about 75% or 80% of all railroad employees were believed to belong to a union, the report continued: 'Nonunion members, nevertheless, share in the benefits derived from collective agreements negotiated by the railway labor unions but bear no share of the cost of obtaining such benefits.' Ibid. These considerations overbore the arguments in favor of the earlier policy of complete individual freedom of choice."[14]

Consequently, in 1951 Congress sanctioned union shop agreements in the rail industry by adopting § 2,

[13] 367 U.S. at 760-61, 6 L.Ed.2d at 1156-57.

[14] 367 U.S. at 762-63, 6 L.Ed.2d at 1157-58 (footnote omitted).

Eleventh. In doing so Congress "contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes."[15]

The constitutionality of § 2, Eleventh was soon under attack in the courts. In *Hanson* a group of railroad employees who sought to avoid union membership argued that their First and Fifth Amendment rights were invaded by the compulsions of a union shop agreement sanctioned by § 2, Eleventh. The Supreme Court disagreed. Finding the statutory sanction of union shop agreements a reasonable exercise of congressional power under the Commerce Clause,[16] the Court explained its rejection of the constitutional objections and delineated the scope of its holding in these words:

"Wide-ranged problems are tendered under the First Amendment. It is argued that the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights. It is said that once a man becomes a member of these unions he is subject to vast disciplinary control and that by force of the federal Act unions now can make him conform to their ideology.

[15]367 U.S. at 764, 6 L.Ed.2d at 1158.

[16]351 U.S. at 233-35, 100 L.Ed at 1131-32.

". . . It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record. Congress endeavored to safeguard against that possibility by making explicit that no conditions to membership may be imposed except as respects 'periodic dues, initiation fees and assessments.' If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. For we pass narrowly on § 2, Eleventh of the Railway Labor Act. We only hold that *the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments.*" 351 U.S. at 236-38, 100 L. Ed. at 1132-34 (emphasis added, footnotes omitted).

In *Street* the Court faced a different attack on the statute. The plaintiffs in *Street* were railroad employees who complained that portions of the union dues which they paid were used for *political* purposes antithetical to their beliefs rather than for collective bargaining purposes. The Court found that such expenditures were not sanctioned by the statute, holding that § 2, Eleventh "is to be construed to deny the unions, over an employee's objections, the power to

use his exacted funds to support political causes which he opposes." 367 U.S. at 768-69, 6 L.Ed.2d at 1161. The Court remanded for a determination of the proper remedy to protect each employee's rights,[17] but in doing so the Court never suggested that an employee could be permitted to completely cease his financial contributions to the union. In fact, the Court specifically reaffirmed the constitutional validity of compulsory exaction of union dues under union shop agreements:

[17]The Court suggested two possible remedies:

"One remedy would be an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget. The union should not be in a position to make up such sum from money paid by the nondissenter, for this would shift a disproportionate share of the costs of collective bargaining to the dissenter and have the same effect of applying his money to support such political activities. A second remedy would be restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed. There should be no necessity, however, for the employee to trace his money up to and including its expenditure; if the money goes into general funds and no separate accounts of receipts and expenditures of the funds of individual employees are maintained, the portion of his money the employee would be entitled to recover would be in the same proportion that the expenditures for political purposes which he had advised the union he disapproved bore to the total union budget." 367 U.S. at 774-75, 6 L.Ed.2d at 1164-65. *See also* Brotherhood of Railway and Steamship Clerks v. Allen, 1963, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235.

"[T]he union-shop agreement itself is not unlawful [Citing *Hanson.*] The appellees therefore remain obliged, as a condition of continued employment, to make the payments to their respective unions called for by the agreement. Their right of action stems not from constitutional limitations on Congress' power to authorize the union shop, but from § 2, Eleventh itself. In other words, appellees' grievance stems from the spending of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the union-shop agreement by the mere collection of funds. If their money were used for purposes contemplated by § 2, Eleventh, the appellees would have no grievance at all." 367 U.S. at 771, 6 L.Ed. 2d at 1162.

Thus *Street* left unimpaired the imprimatur of constitutionality which had been placed on § 2, Eleventh by *Hanson*. Only the *expenditure* of union funds *for non-collective bargaining purposes* was interdicted by the Court's statutory construction in *Street*.[18]

In the present case plaintiff does not contend that any portion of the financial contributions demanded by the union would have been used for non-collective bargaining purposes. Instead, he takes the position that "being a member of a union or financially supporting a union, in itself, is objectionable to his prin-

[18]For a subsequent application of the *Street* holding see Brotherhood of Railway and Steamship Clerks v. Allen, 1963, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235.

ciples." 302 F.Supp. at 295. He argues that § 2, Eleventh, as applied to an employee with his religious convictions, is unconstitutional. We cannot agree.

In both *Hanson* and *Street* the Supreme Court upheld the power of Congress to enact a law permitting union shop contracts in the railroad industry. The primary justification for such an enactment is the policy that all who benefit from the collective bargaining activities of a railroad union should help to bear the cost of such activities. Thus viewed, the union dues exacted from all employees as a condition of employment under union shop agreements simply constitute a "tax" in support of the collective bargaining efforts of the union. In this regard we note that plaintiff Gray has never been asked to subscribe to any tenets or doctrines of unionism. He has merely been requested to pay his share of the cost of collective bargaining under the union shop agreement. Congress has clearly authorized such union shop agreements, and the Supreme Court has instructed us that such an arrangement does not violate the First Amendment. This being true, we cannot grant plaintiff's request that he be freed from the compulsions of the union shop agreement.

Nor do we consider this a harsh or unjust result. As Judge Thomas observed below, "[p]laintiff's religious scruples are not the first which [have] had to yield to the general applicability of a statute." 302 F.Supp. at 296. The First Amendment commands us

to be vigilant in protecting the free exercise of religion, but religious conscience cannot be a superordinating factor in every situation. The hand of government is not to be stayed where a compelling governmental interest outweighs the infringement upon First Amendment rights. The Supreme Court has repeatedly taught us that the First Amendment's protection of religious conscience is not absolute when a religious opinion is translated into an act or a refusal to act. Although the Court refused to sanction a state statute compelling a salute to the flag where religious conscience said "nay," *West Virginia State Board of Education v. Barnette*, 1943, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, the Court did uphold compulsory vaccination requirements even when they offended religious conscience, *Jacobson v. Massachusetts*, 1905, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643. Although the Court refused to sanction a state's denial of unemployment compensation to sabbatarians who resfused all Saturday employment, *Sherbert v. Verner*, 1963, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965, the Court did uphold Sunday closing laws which were applied to sabbatarians despite their claims that such laws interfered with the free exercise of their religion, *Braunfeld v. Brown*, 1961, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563. Long ago the Court held a statute forbidding polygamy constitutional even when applied to Mormons who had a genuine and sincere conviction that polygamy was a practice commended by God. *Reynolds v. United States*, 1879, 98

U.S. 145, 25 L.Ed. 244. We do not doubt that plaintiff Gray has a genuine and sincere religious conviction that his financial support of a labor union would be wrong, but it is simply not possible in an ordered society to allow every aspect of religious belief to stay the hand of government under the aegis of the First Amendment.

The judgment of the district court is AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1969

No. 28202

D. C. Docket No. CA 5288-68-T

RICHARD T. GRAY

Plaintiff-Appellant,

versus

GULF, MOBILE & OHIO RAILROAD COMPANY, a corporation, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

Before TUTTLE, WISDOM and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

July 13, 1970

Issued as Mandate: Aug. 4, 1970.

IN THE

United States District Court

FOR THE

SOUTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

RICHARD L. GRAY,
Plaintiff,

v.

GULF, MOBILE & OHIO RAILROAD COMPANY, a corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Defendants.

CIVIL ACTION No. 5288-68-T

This matter comes before the Court on the defendant's motion to dismiss, or alternatively, motion for summary judgment. There is no genuine dispute as to any material fact and the cause is properly before the Court for summary judgment. The facts are as follows:

On March 1, 1953, defendant Gulf, Mobile & Ohio Railroad Company, hereinafter referred to as GM&O and defendant International Association of Machin-

ists and Aerospace Workers, AFL-CIO, hereinafter referred to as IAM, entered into an agreement pursuant to the provisions of Public Law 914 approved January 10, 1951, as Section 2, Eleventh, of the Railway Labor Act (45 U.S.C.A., Sec. 152, Eleventh). This union shop agreement is between the railroad and substantially all of the railway labor organizations representing employees of the railroad.

Plaintiff Richard L. Gray was discharged by GM&O on November 25, 1968, from his employment as a machinist with the defendant railroad for failure to comply with the provisions of this agreement. The agreement requires all employees of the railroad in the craft or class of machinist represented by the IAM, as a condition of their continued employment, become members of the IAM within sixty (60) calendar days from the date they become employees and thereafter to maintain membership in the IAM by tendering the periodic dues, initiation fees, and assessments uniformly required as a condition of acquiring or retaining membership. Gray admittedly refused to comply with the requirements of such agreement. His refusal was based upon the grounds that to do so would violate his religious convictions. Plaintiff sues for reinstatement to his employment, for an injunction against future discharge for failure to pay dues and fees to the IAM so long as such refusal is because of religious convictions, and for damages for his discharge. His complaint is based upon the grounds that the application of the provision of the

union shop agreement to him constitutes a violation of the provisions of First, Fifth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution.

The plaintiff does not ask the Court to declare Section 2, Eleventh, of the Railway Labor Act, unconstitutional. The constitutionality of the statute has been determined. *Railway Employees' Department, American Federation of Labor, et al v. Hanson, et al*, 351 U.S. 225 (1956). It is plaintiff's contention that the statute is not to be so construed or applied as to attribute to Congress an intent to authorize a contract depriving a man of employment because of his holding to his genuine and sincere religious convictions. The sincerity of plaintiff's religious faith is not in dispute.

The facts show that plaintiff was initiated into membership to Lodge 342 of the IAM located in Bloomington, Illinois, in June of 1951, and plaintiff continued to be a member in good standing in that Lodge, including the periodic payment of dues, through February 1966. On December 14, 1964, Gray became an employee of the GM&O as a machinist. Since he was already a member of Lodge 342 of the IAM, he was in compliance with the provision of the union shop agreement and continued in compliance during his period of employment with GM&O.

In January 1962, the plaintiff sought and was granted a 90 day leave of absence in order that he

might engage in work for his church organization. The plaintiff is a member of the Seventh Day Adventist Church. During his leave of absence, the plaintiff continued his membership in the IAM. Plaintiff returned to work for the railroad as machinist following the expiration of his leave and remained a member of the union until he terminated his employment with GM&O in 1966.

In February 1967, plaintiff Gray returned to the employment with the railroad and under the terms of the union shop agreement was required to comply with the terms of the agreement within sixty (60) calendar days. Plaintiff refused to do so, giving as the reasons his religious convictions. Plaintiff also refused to utilize an alternative arrangement of paying an initiation fee and regular monthly dues without becoming a member of the union. It cannot be disputed that the union and its representatives were more than liberal in attempting to secure plaintiff's membership in the IAM. However, plaintiff stood firm in his refusal, contending that he could not belong or financially support an organization which violated his religious convictions.

It is noted that plaintiff, in lieu of union dues, is willing to pay to a designated charity, money in an amount equal to the periodic union dues.

Following the prescribed and detailed procedure contained within the union shop agreement, plaintiff was notified in writing by the IAM that he was not in

compliance with the agreement and unless he did so immediately, action necessary to enforce the agreement would be taken. Plaintiff continued to refuse to join or contribute to the union organization. Shortly thereafter, disciplinal proceedings were begun and plaintiff received and exhausted all administrative remedies then available to him. He was held to be in noncompliance with the agreement at every stage of the proceedings and on or about November 25, 1968, plaintiff's employment with GM&O was terminated for failure to comply with the provisions of the union shop agreement. On December 16, 1968, this suit was filed seeking relief as more specifically set forth above.

To state in the simplest manner, the plaintiff moves this Court to hold that the application of the Railway Labor Act, Section 2, Eleventh, shall have no application to a railroad employee who feels that union membership or financial support to the union, violates his personal religious convictions. After careful examination of the latest Supreme Court interpretations of the Act, the Court finds the plaintiff's position to be untenable.

A full recitation of the Act's legislative history and purpose is not necessary. A complete legislative background is set forth in *International Machinists* v. Street, 367 U.S. 740 (1960).

It is sufficient to state that in enacting the legislation, Congress decided that public policy required the

establishment of a collective bargaining agency for the effective operation of the industry.

"Congress, acting within the constitutional powers has the final say on policy issues. If it acts unwisely, the electorate can make a change. The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises. The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary." *Hanson*, supra, p. 234.

The only conditions to union membership under the Act is the periodic payment of dues, initiation fees and assessments. The purpose underlying this requirement is obvious. The cost of collective bargaining and other legitimate union activities is to be borne by the individual members who receive the benefits. Plaintiff argues that the Supreme Court in *Hanson* and *Street* decisions have "left the door open" for an exception to this blanket requirement. The Court does not so interpret the decisions.

In *Hanson*, the Court held that Congress has the authority to create and establish the collective bargaining agent and that Congress has the power to authorize the requirement of financial support by the individual members.

"We only hold that the requirement for financial support of the collective-bargaining agency by *all* who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either First or the Fifth Amendments."

Emphasis added, *Hanson*, P. 238.

In *Street*, the Supreme Court held that the union cannot expend dues of dissenting employees for political activities which the individual employee finds objectionable. The basis for the decision was that "political activities" were not included within the purposes contemplated by Congress in enacting the legislation.

The requirement of financial support for legitimate union activities remained intact. As stated by Justice Brennan, delivering the opinion of the Court:

The appellees therefore remain obliged, as a condition of continued employment, to make the payments to their respective unions called for by the agreement. Their right of action stems not from constitutional limitations on Congress' power to authorize the union shop, but from Section 2, Eleventh, itself. In other words, appellees grievance stems from the spending of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of union-shop agreement by the mere collection of funds. If their money were used for purposes contemplated by

Section 2 Eleventh, the appellees would have no grievance at all. Street, supra p. 771.

Justice Douglas concurring:

As long as they (union) act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy. Street, supra p. 778.

Plaintiff does not contend that certain union activities are ideologically objectionable or that certain activities are "outside" Congress' contemplated purposes, but asserts that being a member of a union or financially supporting a union, in itself, is objectionable to his principles.

The expressed Congressional intent in enacting the statute was to make all who share the benefits, share the cost. See: *H. R. Rep. No. 2811, 81st Cong. 2d Sess.*, p. 4. Also, the benefits gained through the collective bargaining cannot be denied to a non-member.

"Performance of these functions (collective bargaining) entails the expenditures of considerable funds. Moreover, this Court has held that under the statutory scheme, a union's status as exclusive bargaining representative carries with it the duty fairly and equitably to represent all employees of the craft or class, union and nonunion.
Emphasis added, Street, supra p. 761.

The Seventh Day Adventist Church does not advocate that its members refrain from joining or supporting labor unions. The members, as individuals, are the sole judge for their action. A church which, as part of its religious doctrine, opposes organized labor is not before the Court, but rather a sincere individual who finds such organization in conflict with his religious conscience. To allow plaintiff, and presumably all others who share similar beliefs, to maintain their railroad employment and to make periodic payments to designated charities, contributes nothing to the support of the union representation and circumvents the intent of Congress.

Complaints similar to plaintiff's have been presented to the Courts previously, only to be denied relief. *Wicks v. Southern Pacific Company*, 231 F.2d 130 (9th C.A. 1956), cert. den. 351 U.S. 946; *Otten v. Baltimore & Ohio Railroad Company*, 205 F.2d 58 (2nd C.A. 1953); *Otten v. Staten Island Rapid Transit Railway Company*, 229 F.2d 919 (2nd C.A. 1956), cert. den. 351 U.S. 983.

Plaintiff's religious scruples are not the first which has had to yield to the general applicability of a statute. *Jacobsen v. Massachusetts*, 197 U.S. 11; *Shapiro v. Lyle*, 30 F.2d 971; *Reynolds v. U.S.*, 98 U.S. 145; and *People v. Vogelgesang*, 116 N.E. 977.

In this modern world, conflicts between individual consciences and the applicability of national legislation are abundant. Just as individual conflicts are in-

evitable, individual compromises are necessary. The union shop agreement applies to all employees and is applied in a non-discriminatory manner. All that is required of plaintiff is to contibute to the efforts of the union which procures through collective bargaining his employment benefits.

Therefore, it is ORDERED, ADJUDGED and DECREED by the Court that the defendant's motion for summary judgment should be and is hereby GRANTED.

It is further ORDERED, ADJUDGED and DECREED by the Court that the plaintiff's prayer for interim relief should be and is hereby DENIED.

It is further ORDERED, ADJUDGED and DECREED by the Court that this cause is hereby DISMISSED.

Cost to be taxed against the plaintiff.

DONE at Mobile, Alabama, this the 29th day of May 1969.

DANIEL H. THOMAS
United States District Judge

U. S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
29th DAY OF MAY 1969.
MINUTE ENTRY No. 25550
WILLIAM J. O'CONNOR, CLERK
BY — WILLIAM E. TAYLOR
Deputy Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 831

RICHARD L. GRAY, *Petitioner*

v.

GULF, MOBILE & OHIO RAILROAD COMPANY, a corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Respondents

BRIEF FOR RESPONDENT UNION IN OPPOSITION

OPINIONS AND JUDGMENTS BELOW

The opinion and judgment of the District Court (App. 22a)[1] is reported at 302 F.Supp. 392 (1969). The opinion (App. 1a) and judgment (App. 20a) of the Court of Appeals for the Fifth Circuit is reported at 429 F. 2d. 1064 (1970).

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[1] References are to the Appendix to the Petition unless otherwise stated.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

RESTATEMENT OF QUESTION PRESENTED

Are the statutory or constitutional rights of a railroad employee violated by a requirement that he pay uniformly required union dues and fees, without the necessity of becoming a member of the union, pursuant to the provisions of the Railway Labor Act and a union shop agreement executed thereunder in circumstances where the employee asserts as a matter of individual belief that compliance conflicts with his religious convictions?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions which Petitioner seeks to invoke are set forth in the Petition at p. 3. The provisions of Section 2 Eleventh (a) of the Railway Labor Act, 45 U.S.C. § 152 Eleventh (a), involved, are set forth in the Petition at pp. 3-4.

RESTATEMENT OF THE CASE

Both the District Court and Court of Appeals found and Petitioner concedes that there is no genuine issue of any material fact in dispute in the case (App. 2a, 22a, and Pet. 4). Because the Petition does not adequately relate all relevant facts of record and because Respondent Union is of the opinion that the Petition sets forth argument as alleged facts (Pet. 7-10), Respondent Union refers the Court to the findings of fact of the District Court (App. 22a-26a) accepted by the Court of Appeals as an accurate statement of the facts (App. 2a, fn. 1).

For example, the Petition (p. 10) erroneously states that "it stands as established and uncontradicted that plaintiff's religious faith is in direct conflict with the requirement of defendants that he pay dues and fees to the Union." The effort made by Petitioner to equate his individual beliefs with the dogma of the Seventh-Day Adventist faith does not square with findings of fact of either the District Court (App. 30a) or the Court of Appeals (App. 7a).[2] The Petitioner recognizes as much when he argues (Pet. 9) that the District Court erred in stating (App. 30a) that the Seventh-Day Adventist Church "does not advocate that its members refrain from joining or supporting labor unions." It is Respondent Union's position that even if the dogma of the Seventh-Day Adventist Church did contain prohibitions against its members joining labor unions, the statutory requirement that an employee pay uniformly required union dues and fees would not violate any statutory or constitutional right. However, the facts and the findings of the Courts below make clear that such a church tenet is not here involved. *Cf. Sherbert* v. *Verner*, 374 U.S. 398.

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[2] Included in the record is a letter signed by the Associate Director of the Department of Religious Liberty of the Seventh-Day Adventist Church addressed to an officer of Respondent Union on May 16, 1967, setting forth the position of the Church with reference to its relationship to labor unions. This letter stated that Seventh-Day Adventists are in sympathy with the basic objectives of organized labor—proper wages, proper hours, and proper working conditions—and further stated that "They believe that those laborers who are conscientiously free to do so are warranted in organizing to obtain such objectives." It further stated that "It is on the basis of these principles that *they accord to every man the right to join or not to join, a labor union.* They believe, however, that no opposition should be raised against, and no penalties or disabilities applied to, those who choose not to belong to labor unions for reasons of conscience." (App. 5a-6a.) (Emphasis supplied.)

In addition, the findings of the Courts below show, among other things, that for a period of many years prior to 1967 Petitioner was a member of Respondent Union while continuing as an active member of his Church and that it was not until his return to work from a leave of absence that he refused to rejoin the Union or accept the alternative of simply paying uniformly required fees and dues without joining. (App. 24a, 25a.)

ARGUMENT

The statutory and constitutional issue presented in this case is a narrow one which in the opinion of the Courts below has already been determined by this Court. No court and no judge of any District Court or Court of Appeals has accepted Petitioner's basic contention that statutory or constitutional rights are infringed if the union shop requirements of the Railway Labor Act are applied to a railroad employee who maintains that the payment of dues and fees uniformly required as a condition of employment are in conflict with his individual religious convictions. On the other hand, contentions substantially similar to those here involved have been rejected by Courts of Appeals for the Second and Ninth Circuits and petitions to review these decisions were denied by this Court. *Otten* v. *Staten Island Rapid Transit Ry. Co.*, 229 F.2d. 919 (2d Cir., 1956) *cert. den.* 351 U.S. 983; *Wicks* v. *Southern Pacific Co., et al.*, 231 F.2d 130 (9th Cir., 1956) *cert. den. Wicks* v. *Brotherhood of Maintenance of Way Employes*, 351 U.S. 946.

Thus, there is no conflict of decisions and none is asserted by Petitioner. Moreover, in the light of this Court's decisions in *Railway Employes' Dept., AFL,*

et al. v. *Hanson*, 351 U.S. 225 and *International Association of Machinists* v. *Street*, 367 U.S. 740 upon which the decision below was predicated, there is no important question of Federal law presented which requires decision by this Court. Under such circumstances, the case clearly is not one warranting review by this Court on certiorari.

The argument presented by Petitioner is a two-pronged approach that either the statute has been misinterpreted and misapplied or that it is unconstitutional. The District Court was of the opinion that Petitioner was not seriously pressing his claim of unconstitutionality because that issue had already been determined by the Supreme Court but was confining his argument to the statutory construction issue (App. 24a). In any event, there was no application by Petitioner for the establishment of a three-judge court under 28 U.S.C. §§ 2282-2284 which is the required procedure when injunctive relief is sought on the basis of asserted unconstitutionality of an Act of Congress. *Coffman* v. *Breeze Corps., Inc.*, 323 U.S. 316, 317 fn. 1.

On the other hand, the Court of Appeals thought so little of Petitioner's statutory construction contention as to summarily reject it as "totally devoid of merit" and confined its review to Petitioner's constitutional argument (App. 9a). In doing so and rejecting that argument, however, the Court of Appeals makes clear that it regarded the contention as narrowed on appeal to the First Amendment (App. 8a, fn. 8), a position which the Court regarded as untenable under this Court's decisions in *Hanson and Street, supra* (App. 9a). The disposition of the constitutional issue by the Court of Appeals is justified on the ground that it

correctly regarded Petitioner's contention as failing to present a substantial constitutional question and one obviously without merit. Otherwise, the issue would have had to be first determined by a statutory court of three judges. *Ex parte Poresky*, 290 U.S. 30; *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713; *Flast* v. *Cohen*, 392 U.S. 83, at p. 90, fn. 3.

We now turn to a discussion of the two contentions presented by Petitioner to this Court in justification of certiorari, both of which were rejected below in a decision which we submit was clearly correct.

I

The Court of Appeals Correctly Held That a Requirement That Petitioners Pay Uniformly Required Union Dues and Fees as a Condition of Continued Employment Under an Applicable Union Shop Agreement Does Not Violate Any of Petitioner's Statutory or Constitutional Rights

Petitioner first argues that Section 2 Eleventh of the Railway Labor Act should be construed as not requiring a railroad employee to pay uniformly required dues and fees as a condition of continued employment if he objects to such payment on religious grounds. In the alternative, Petitioner contends that if the statute is not so construed it is unconstitutional.

The applicable provisions of Section 2 Eleventh which authorize union shop agreements in the railroad industry are quoted at pp. 3-4 of the Petition. These provisions contain no limitation or exception for railroad employees who object to the payment of uniformly required dues or fees on religious grounds and there are no indications in the legislative history of the provi-

sions that Congress had any such intention. The only condition contained in the statute is that no railroad employee shall lose his job for lack of union membership for any reason other than his failure to tender periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

In support of his argument Petitioner concedes that the exception he seeks does not appear on the face of the statute (Pet. 13) but argues that this Court's decisions in *Railway Employes' Dept., AFL* v. *Hanson*, 351 U.S. 225 and *International Association of Machinists* v. *Street*, 367 U.S. 740; *Brotherhood of Railway Clerks* v. *Allen*, 373 U.S. 113; and *Welsh* v. *United States*, ... U.S. ..., 26 L.Ed. 2d 308, indicate that the Court will construe the statute in such a way as to protect First Amendment rights under the Constitution. He then goes on to state that it follows that the statute should be construed as not authorizing the payment of union dues and fees from those whose religious beliefs conflict with such payment (Pet., 11-14).

The Court of Appeals rejected this argument as "totally devoid of merit" (App. 9a). That Court's analysis of the *Hanson* and *Street* decisions read in conjunction with its discussion of Petitioner's constitutional argument demonstrates that whether the problem is approached as one of statutory construction or of constitutional interpretation, Petitioner's contentions are lacking in substance.

The attack there on the constitutionality of Section 2 Eleventh in the *Hanson* case included claims that the statute and agreements executed under it violated pro-

tections of the First and Fifth Amendments to the Federal Constitution. In rejecting these claims this Court first found that the purpose of Section 2 Eleventh is the financing of the cost of collective bargaining in industries subject to the Railway Labor Act and that Congress had determined such purposes to be in the public interest. This Court then determined that such purpose was a valid one which did not infringe on rights under the First and Fifth Amendments and, with particular application to the issue here, it expressly emphasized that it was only holding "that *the requirements for financial support* of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendment." 351 U.S. 225, 236-238. (Emphasis supplied.)

What this Court expressly reserved for future assessment in *Hanson* were two issues only, neither of which is presented by Petitioner. First, it stated that if conditions other than a uniform requirement of dues, initiation fees or assessments were imposed in a particular case as a condition of employment, its judgment in the *Hanson* case would not prejudice a decision in such a case. Second, it stated that if the exaction of dues, initiation fees or assessments is used as a cover for forcing ideological conformity in contravention of the First Amendment, the *Hanson* decision would not foreclose that issue. It is undisputed here that no conditions other than the payment of dues and fees uniformly required of all employees have been imposed upon Petitioner and it is likewise established by the undisputed facts that this requirement of financial support is not being used as a cover for forcing

ideological conformity in any manner. Petitioner has not been asked to subscribe to any union tenets or doctrines nor, in fact, has he been required to join the union. He has only been required to contribute on a uniform basis with all other employees to the cost of representation.

Five years later in the *Street* case this Court had before it a claim by railroad employees that a substantial part of the dues and fees they were required to pay under a union shop agreement was being used to finance the campaigns of candidates for federal and state office whom they opposed and to promote the propagation of economic doctrines, concepts and ideologies with which they disagreed. Their claim of unconstitutionality for deprivation of rights under the First and Fifth Amendments was upheld by the Georgia courts. This Court held that the problem was not of constitutional dimensions, but rather involved expenditures of dues and fees for purposes not sanctioned by the statute. It remanded the case for determination of the proper remedy to preclude the invalid expenditure but, in doing so, it specifically reaffirmed the constitutional validity of compulsory payment of union dues and fees—the only issue involved in the instant Petition. On this point the Court observed, 367 U.S. 740 at 771:

> "[T]he union-shop itself is not unlawful [citing *Hanson*]. The appellees therefore remain obliged, as a condition of continued employment, to make the payments to their respective unions called for by the agreement. Their right of action stems not from constitutional limitations on Congress' power to authorize the union shop, but from § 2, Eleventh itself. In other words, appellees' grievance stems from the spending of their funds for purposes not

> authorized by the Act in the face of their objection, *not from the enforcement of the union-shop agreement by the mere collection of funds.* If their money were used for purposes contemplated by § 2, Eleventh, the appellees would have no grievance at all." (Emphasis supplied.)

Thus, the *Street* decision and the subsequent decision of this Court in *Brotherhood of Railway and Steamship Clerks* v. *Allen,* 373 U.S. 113 provide only that an employee who objects to union funds being used for purposes other than collective bargaining must make his objection known to the union and obtain a proportionate reduction. But these decisions do not stand for the proposition that an employee can, as Petitioner seeks to do in the present case, refuse to pay any dues or fees on the ground that to do so is objectionable to his religious principles.

Insofar as Petitioner relies upon this Court's decision in *Welsh* v. *United States,* ... U.S. ..., 26 L.Ed 2d 308, we fail to see how that decision is relevant to the issue here involved. What the Court there held was that exemptions from military services contained in Section 6(j) of the Universal Military Service and Training Act, properly interpreted, were not confined to purely religious beliefs in the traditional or theistic sense but extended as well to moral or ethical beliefs held with the same degree of conviction. What the case did not decide or involve, apposite to the issues here, was whether Congress could consistently with the First Amendment, eliminate all exemptions for conscientious objectors on religious grounds or otherwise.

II

There Is No Conflict of Decisions

There are no other decisions, trial or appellate, which conflict with the decision below here sought to be reviewed and consequently none are asserted by Petitioner. On the other hand, as indicated by the District Court in the instant case, complaints similar to Petitioner's have been rejected by other Courts of Appeals and petitions to review these decisions denied by this Court (App. 30a).

The list of previous cases involving complaints similar to that of Petitioner include the following: *Otten* v. *Baltimore & Ohio Railroad Co.*, 205 F.2d 58 (2d Cir., 1953); *Otten* v. *Staten Island Rapid Transit Co.*, 229 F.2d 919 (2d Cir., 1956) *cert. den.* 351 U.S. 983; *Wicks* v. *Southern Pacific Co., et al.*, 231 F.2d 130 (9th Cir., 1956) *cert. den., Wicks* v. *Brotherhood of Maintenance of Way Employes*, 351 U.S. 946. Petitioner gives these cases scant attention in a footnote and dismisses them as not involving any "constitutional problem or issue" (Pet., p. 12, fn. 1).

This summary treatment of such decisions is in error. Petitioner's contention is that the *Otten* and *Wicks* cases involved only the question of whether or not a union shop agreement is private action in which no governmental involvement is present in a constitutional sense. It is recognized that since this Court's decision in *Hanson*, governmental action is involved in union shop agreements. However, it is simply not accurate to describe the *Otten* and *Wicks* decisions as being limited to a consideration of this issue. The decision of the Second Circuit in the *Otten* case considered and ruled upon two questions; i.e., (1) whether the action should be tried by a court of three judges, and (2)

whether the District Court had erred in its holding on the merits of the First Amendment issue presented. The Second Circuit in an opinion written by Judge Learned Hand held that no substantial constitutional issue requiring a three-judge court was presented. That Court also made the following findings with respect to the merits (205 F.2d 58, at p. 61):

> "The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. A man might find it incompatible with his conscience to live in a city in which open saloons were licensed; yet he would have no constitutional right to insist that the saloons must be closed. He would have to leave the city or put up with the *iniquitous dens*, no matter what economic loss his change of domicile entailed. We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world." (Emphasis the Court's.)

In the *Wicks* case both the District Court and Court of Appeals also considered the case on the merits and rejected plaintiff's contention that his religious rights under the First Amendment and other constitutional rights had been infringed. 121 F.Supp. 454 at 457 (S.D. Calif., 1954); 231 F.2d 130, 135, 138 (9th Cir., 1956).

The remaining cases cited and discussed in the Petition (pp. 17-25) have no bearing upon the issues presented for review in this case in that they deal with unrelated problems with an entirely different type of

compulsion and are adequately answered by the Court below (App. 17a-19a). This is particularly true in light of the fact that this Court in the *Hanson, Street,* and *Allen* cases as discussed above, specifically dealt with constitutional challenges to the requirements of Section 2 Eleventh of the Railway Labor Act and held that the required payment of dues and fees uniformly required of all employees subject to union shop agreements does not violate First Amendment rights under the Federal Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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